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No. 399

Supreme Court of the United States

October Term, 1965

SARAH SMITH, as Administratrix of the Estate of JOHN C. SMITH, deceased, and GEORGE THOMAS HOLLEY,

Petitioners,

v.

UNITED STATES OF AMERICA and MARINE TRANSPORT LINES INC., as owners of the USNS POTOMAC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners,

v.

UNITED STATES OF AMERICA and MARINE TRANSPORT LINES INC., as owners of the USNS POTOMAC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinions Below

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, reported in 34 — F. 2d — and 1965 A. M. C. —. The three-judge panel of the Court of Appeals, with one judge dissenting, affirmed an order entered in admiralty by the United States District Court for the Eastern District of North Carolina in accordance with its opinion reported in 237 F. Supp. 434, and 1964 A. M. C. 1725.

Jurisdiction

The judgment of the Court of Appeals was entered on May 3, 1965. Jurisdiction is invoked under 28 U. S. C. § 1254(1) and 2101(c).

Question Presented

Marine Transport Lines, Inc. operated the USNS "POTOMAC" under a cost plus fixed fee Armed Services Procurement Contract drafted by the Navy as a simultaneous bareboat charter out to Marine Transport Lines and time charter back to the United States. Pursuant to the contract Marine Transport Lines equipped, fueled, supplied, manned, victualed and navigated the ship. In the contract, the Master, officers and crew members were defined as employees of Marine Transport Lines, "at all times and not of the Government". Under these circumstances, was Marine Transport Lines, Inc. *the agent* of the United States of America within the meaning and purpose of the 1950 amendment to the Suits in Admiralty Act, 46 U. S. C. § 745, so that injured seamen and representatives of deceased seamen who were employed by Marine Transport Lines on the USNS "POTOMAC" are precluded from seeking damages from Marine Transport Lines, under the Jones Act, 46 U. S. C. §688?

Statutes and Regulations Involved

Jones Act, 46 U. S. C. § 688

RECOVERY FOR INJURY TO OR DEATH OF SEAMAN

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action

for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (41 Stat. 1007)

Suits in Admiralty Act, 46 U. S. C. § 745

745. CAUSES OF ACTION FOR WHICH SUITS MAY BE BROUGHT; LIMITATIONS; EXCEPTIONS; ACTIONS WHICH MAY NOT BE REVIVED; INTEREST ON CLAIMS

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further*, That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further*, That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by Section 742 of this Title unless upon a contract expressly stipulating for the payment of interest. (64 Stat. 1112)

General Military Law—Procurement, 10 U. S. C. § 2306

KINDS OF CONTRACTS

(a) The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to this limitation and

subject to subsections (b)-(e), the head of an agency may, in negotiating contracts under section 2304 of this title, make any kind of contract that he considers will promote the best interests of the United States. (70A Stat. 130)

Armed Services Procurement Regulations—32 C. F. R. § 1.1401(e) and 32 C. F. R. § 1.1402

SUBPART N—PREFERENCE FOR UNITED STATES-FLAG PRIVATELY OWNED OCEAN CARRIERS

§ 1.1401 DEFINITIONS.

As used in this subpart:

(e) "Private United States vessels" means privately owned United States-flag commercial vessels, including such vessels when under voyage or time charter to the United States Government, and including Government-owned vessels under bareboat charter to private operators.

§ 1.1402 GENERAL.

It is the policy of the Department of Defense, in furtherance of the Cargo Preference Act (68 Stat. 832; 46 U. S. C. 1241(b)) and 10 U. S. C. 2631 to encourage and foster the American merchant marine. When transportation of supplies by ocean vessel is required:

(a) Private United States vessels shall be employed for the transportation of at least 50 percent of the aggregate gross tonnage per annum of the following categories of supplies:

(1) Supplies owned by the Government and in the possession of a Military Department, or of a contractor, or subcontractor of any tier, of a Military Department;

(2) Supplies for the use of the United States which are contracted for and require subsequent delivery to a Military Department but are not owned by the Government at the time of shipment; and

(3) Supplies procured, contracted for or otherwise obtained for non-reimbursable contribution to foreign assistance programs, but which are not owned by the Government at the time of shipment; provided, that this requirement shall not extend to the ocean transportation between foreign countries of supplies procured with local currency funds made available, or derived from funds made available, under the Mutual Security Act. Provided, that the allocation of gross tonnage will be computed separately for dry bulk carriers, dry cargo liners, and tankers and in such a manner as to assure fair and reasonable participation by geographic areas; and provided, that private United States vessels are available at fair and reasonable rates for such vessels.

Statement of the Case

On September 26, 1961, John C. Smith and George Thomas Holley were employees of Marine Transport Lines and members of the crew of the USNS "Potomac", which caught fire and exploded at Moorehead City, North Carolina. The United States, owner of the ship, and Marine Transport Lines jointly filed a Petition for Exoneration From or Limitation of Liability in the United States District Court for the Eastern District of North Carolina at New Bern, pursuant to 46 U. S. C. 183 *et seq.*, Supreme Court Admiralty Rule 51.

As did other claimants, Holley and the Administratrix of the Estate of John C. Smith filed their claims. Holley and Smith's Administratrix moved in the District Court for an order modifying the injunction restraining institution or prosecution of claims against either the United States or Marine Transport Lines outside of the limitation of liability proceeding; Smith's Administratrix and Holley sought leave to file civil actions under the Jones Act, 46 U. S. C. § 688 with a jury trial, against Marine Transport

Lines, to be prosecuted in the event exoneration and limitation of liability were eventually denied.

The District Court denied the motion on the ground that by reason of the 1950 amendment to the Suits in Admiralty Act, 46 U. S. C. 745, the members of the crew of the USNS "Potomac" would have no right to proceed against Marine Transport Lines where the amount of the claims exceeded the amount of the insurance coverage that had been obtained; their exclusive remedy being against the United States. However, the Court permitted protective suits to be filed (but not prosecuted) so that the Jones Act statute of limitations of three years would not bar these claimants while the issue was in the appellate courts.

An appeal was taken to a three judge panel of the United States Court of Appeals for the Fourth Circuit under 28 U. S. C. 1292(b) which, with a judge dissenting, affirmed the District Court, on the ground that 46 U. S. C. 745 bars suits against Marine Transport Lines irrespective of the amount of the insurance coverage. The opinions of the District Court and of the Court of Appeals are reproduced in the Appendix to this Petition for Certiorari.

The Petition for Exoneration from or Limitation of Liability filed by the United States of America and Marine Transport Lines, Inc. in the District Court, declared that Marine Transport Lines, Inc. was "owner pro hac vice pursuant to contract whereby the said Marine Transport Lines, Inc. manned, victualed, supplied, operated and navigated the said USNS "Potomac" at its own expense and by its own procurement". Marine Transport Lines, according to testimony in the District Court, operated and managed the USNS vessels including the "Potomac" in the same manner in which it operated and managed vessels owned by Marine Transport Lines, Inc. transferring officers from and to USNS vessels and its own ships as it saw fit, and hiring unlicensed crew members in its regular and customary way.

The contract between the Government (Military Sea Transportation Service, MSTS) and Marine Transport Lines, Inc. was an ordinary procurement contract for the service of transporting military fuel cargoes pursuant to the provisions of Title 10, United States Code and the Armed Services Procurement Regulations, Title 32 Code of Federal Regulations. According to the attorneys for the United States of America in their brief filed with the United States Court of Appeals for the Third Circuit in *Petition of the United States*, 259 F. 2d 608 (3rd Cir. 1958), the MSTS procurement contract was the equivalent of the method utilized by the Government in World War II and the Korean Conflict when ". . . certain Government vessels were bareboat chartered out by the Government under a demise contract for their operation by private shipping companies which simultaneously entered into a second form of charter whereby the same contractor time chartered the demised vessel back to the Government to carry its cargoes." The MSTS procurement contract evolved when ". . . the Navy draftsmen merged the two sets of charter provisions into the present single form of charter agreement. The vessel is still demised by the Government to the contractor as an owner pro hac vice under the bareboat charter provisions who controls and mans, victuals, and navigates it at his own expense and procurement, but who is told, under the time charter provisions, what Government cargoes he is to carry and where, and is still paid his expenses and a profit for his service under the charter's compensation provisions . . . . This new MSTS combination bareboat charter-out time charter—back form of charter agreement . . . while containing both types of charter terms, still makes it plain that the vessel is demised and delivered into (the contractor's) control to man, victual, command and navigate by its own expense and procurement, although subject to reimbursement and profit for the service of carrying Government cargoes."

Although the General Agency Agreement is still in use (see 1964 Supplement to 32A C. F. R. at page 150), the Government determined not to utilize this form of contractual arrangement for the transportation of military fuel cargoes because of the policy, set forth in the Armed Services Procurement Regulations, to promote the use of the American merchant marine: 32 C. F. R. 1.1402(a) directs that private United States vessels shall be employed for the transportation of at least 50% of various categories of military supplies; 32 C. F. R. 1.1401(e) defines private United States vessels to include "Government-owned vessels under bareboat charter to private operators".

This MSTS procurement contract pursuant to which Marine Transport Lines, Inc. operated the USNS "POTOMAC" differs markedly from the General Agency Agreement reviewed by this Court in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783 (1949), *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801 (1949) and *Fink* v. *Shepard S.S. Co.*, 337 U. S. 810 (1949). The General Agency Agreement provides that the vessels are operated by an agency of the United States Government and that the Master of the vessel is the agent and employee of the United States; the MSTS Procurement Contract provides that the Master, officers and crew members of the vessels are employees of the contractor at all times and not of the Government. Seamen who sign on board the vessels subject to the General Agency Agreement are warned in the Shipping Articles that they are employed by the United States of America; the seamen on the "POTOMAC" signed Articles designating Marine Transport Lines, Inc. as their sole employer. Shipowners operating vessels under the General Agency Agreement are directed by Federal Regulations to forward all suits wherein the United States has not been named as a party defendant to the Department of Justice in order that the appropriate defenses may be entered to obtain dismissal of the action. See INS—1 at 1964 Supp. 32A C. F. R. page 150; the

MSTS procurement contract provides for reimbursing the contractor for the amount of judgments obtained against the contractor by third parties including officers and members of the crews of the vessels, and with the knowledge and approval of the Government, civil actions under the Jones Act were prosecuted against Marine Transport Lines and other contractors and defended on the merits prior to the decision of the District Court. The General Agency Agreement provided that the General Agent agrees to manage and conduct the ship's business for the United States, in accordance with such directions, orders or regulations as the United States has prescribed; under the MSTS procurement contract, the contractor undertakes and promises to manage and conduct the business of the Government with respect to such tankers in accordance with such written directions or orders *as to voyages and cargoes* as the Government may from time to time prescribe. Under the cost plus fixed fee MSTS procurement contract, Marine Transport Lines was to be reimbursed for Seamen's wages, maintenance and cure, and damages for death and personal injury. Not once in the MSTS procurement contract is the operator of the vessel referred to as "agent".

Notwithstanding the foregoing differences, the Courts below have ruled that the MSTS procurement contract is not less an agency than that constituted by the General Agency Agreement considered by this Court in *Cosmopolitan Shipping Company* v. *McAllister*, 337 U. S. 783 (1949). *Weade* v. *Dichmann, Wright & Pugh Inc.*, 337 U. S. 801 (1949), and *Fink* v. *Shepard, S. S. Co.*, 337 U. S. 810 (1949).

Reasons for Allowance of Writ of Certiorari

The decision of the Court of Appeals denies to seamen employees of Marine Transport Lines who happen to be injured on board a USNS vessel the privilege of having their claims for damages tried through a jury and the benefit of a three (3) year (Jones Act) as opposed to a two

(2) year (Suits in Admiralty Act) statute of limitations, rights which the seamen would have if the injury took place on a vessel owned by Marine Transport Lines or on bareboat charter from a shipowner other than the Government. Prior to the decision in the District Court, Marine Transport Lines was defending civil actions arising out of injuries on board USNS vessels on the merits, apparently believing that 46 U. S. C. 745 was not applicable. Thereafter, Marine Transport Lines has moved to assert the defense that the seamen's exclusive remedy is in Admiralty against the United States of America in pending cases even where its attorneys had previously persuaded a seaman's lawyer to discontinue a libel in admiralty that had been commenced against the United States of America, and further, where a seaman had sued Marine Transport Lines more than two but less than three years from the date of his injury. If the Court of Appeals is correct, seamen who sued Marine Transport Lines and other contract operators even within two years from the date of their injuries are now without remedy against anyone if their actions have been pending for more than two years from the date of their injuries inasmuch the statute of limitations against the United States has now run. Unlike the situation prevailing under the General Agency Agreement, the seamen serving on board USNS vessels receive no warning in the Shipping Articles or otherwise that they are to look to the United States of America for damages.

The 1950 amendment to the Suits in Admiralty Act was adopted by Congress to codify the five to four decisions of this Court in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783; *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801 (1949) and *Fink* v. *Shepard SS Co.*, 337 U. S. 810 all decided in 1949. Therein, this Court ruled that seamen and passengers on board vessels operated pursuant to the General Agency Agreement could not seek damages, wages or maintenance from anyone other than the United States

of America. In these cases, the majority of this court relied on the fact that there was no demise of the vessel to the General Agent nor was the General Agent an owner *pro hac vice*. *Fink* v. *Shepard SS Co.*, 337 U. S. 810 at 815 (1949). The legislative history of the 1950 amendment to the Suits in Admiralty Act shows that it was the intent of Congress to preserve "the existing rights of seamen under either the Jones Act or the general maritime law, to bring suits in admiralty or at law against their private employers who operate under bare-boat charter or similar arrangements, vessels which are merely owned by the Government." S. Rep. 2535, 81st Cong., 2d Sess. (1950), 1951 AMC 149-50. In accordance with the foregoing, the United States Court of Appeals for the Second Circuit in *Hanlon* v. *Waterman S. S. Co.*, 265 F. 2d 206 (2nd Cir. 1959), cert. den'd 361 U. S. 822 (1959), stated that "agent" in the 1950 amendment to the Suits in Admiralty Act did not include "an operating agent of the United States" but did include "a general agent" 265 F. 2d at 207. Similarly, the United States Court of Appeals for the Fifth Circuit in *Atlantic Coast Line R. R. Co.* v. *Agwilines, Inc.*, 195 F. 2d 459 (5th Cir. 1952) stated that agent did not include "one who is . . . owner pro hac vice operating the vessel". 195 F. 2d at 462.

While the Court below recognized that the 1950 amendment to the Suits in Admiralty Act was intended to codify the *Cosmopolitan* decision, it nevertheless did not look to such decision or to the legislative history of the amendment to ascertain the meaning of the words "the agent" as used therein. Rather, the Court below relied upon a description of the term "agent" contained in the Restatement Agency, 2d. The case law history in this Court and the legislative history of the 1950 amendment to the Suits in Admiralty Act demonstrates that if there is a demise of the vessel, the 1950 amendment to the Suits in Admiralty Act is not applicable since the operator of the vessel is not "the agent" of the Government.

The Courts below ruled that the provisions of the MSTS procurement contract providing for suits by third persons including seamen employed on the vessels against the contractor are totally without meaning and significance. This view is contrary to the view of the United States Court of Appeals for the Third Circuit in *Petition of the United States*, 259 F. 2d 608 (3rd Cir. 1958) affirming 155 F. Supp. 714 (D. Del. 1957). Therein, after examining the MSTS procurement contract, the Court concluded that seamen and other third parties could look only to the contractor for remuneration. 259 F. 2d at 610.

This Court recognized in *Cosmopolitan* v. *McAllister* that whether or not a seaman was restricted to a remedy against the United States of America for personal injuries sustained in the course of his employment depended upon the terms and conditions of the contract between the United States of America and the steamship company. The freedom of contract recognized by this Court in *Cosmopolitan* is reinforced by the provisions of 10 U. S. C. 2306(a) granting to the Departments of the Armed Forces great latitude in negotiating procurement contracts which will promote the best interests of the United States. Pursuant to this grant of authority, the Government drew up a procurement contract under which vessels were demised to private steamship corporations and specifically provided for suits by seamen against the contract operators, the costs, settlements, judgments and expenses of which were to be reimbursed by the Government, to the extent they were not compensated for by insurance.

The Government chose to draft this new form of procurement contract rejecting the readily available General Agency Agreement. As stated by this Court in *Powell* v. *United States Cartridge Co.*, 339 U. S. 497 (1950) at pages 506-507 "it would have been simple for the Government to have ordered all of this production to have been done under governmental operation as well as under govern-

mental ownership. To do so, however, might have weakened our system of free enterprise." In *Powell*, this Court ruled that employees of a cost-plus-a-fixed-fee private contractor operating a Government owned munitions plant were employees of the contractor within the meaning of the Fair Labor Standards Act, and not of the Government.

The same consideration for the maintenance of private enterprise in connection with military procurement contracts that led to the decision of this Court in *Powell* requires a conclusion contrary to that reached by the United States Court of Appeals for the Fourth Circuit herein.

Conclusion

The Courts below failed to pay heed to the reasoning of this Court in *Cosmopolitan*, *Weade* and *Fink*. The definition of "agent" as used in the 1950 Amendment to the Suits in Admiralty Act by the Courts below differs from that of the Second and Fifth Circuits. The decision of the Courts below conflicts with the Third Circuit as regards the right of seamen employed on USNS vessels operated by private shipowners under the MSTS procurement contract to sue their private employer. The ruling of the Courts below is contrary to the policy to maintain private enterprise in connection with national defense procurement.

For these reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners.

APPENDIX

Opinions of United States Court of Appeals For the Fourth Circuit

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No. 9704

SARAH SMITH, Administratrix of the Estate of JOHN C. SMITH, Deceased, and GEORGE THOMAS HOLLEY,

Appellants,

versus

UNITED STATES OF AMERICA and MARINE TRANSPORT LINES, INC., as owners of the USNS POTOMAC, for exoneration from or limitation of liability,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT NEW BERN. WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued February 3, 1965. Decided May 3, 1965.)

Before BRYAN and BELL, Circuit Judges, and CHRISTIE, District Judge.

Donald E. Klein (Schwartz and O'Connell, William K. Rhodes, and Amato, Babalas, Breit, Cohen, Rutter & Friedman, and C. Arthur Rutter, Jr., on brief) for Appellants; Louis R. Harolds (Harvey Goldstein on brief) for The American Trial Lawyers Association, Amicus Curiae, and William E. Gwatkin, III, Attorney, Department of Justice (John W. Douglas, Assistant Attorney General, and Morton Hollander and Leavenworth Colby, Attorneys, Department of Justice, and Robert H. Cowen, United States Attorney, on brief), for Appellees.

ALBERT V. BRYAN, Circuit Judge:

In this maritime cause the question is whether in its contract with the United States for the management of United States Naval Ship (USNS) Potomac, Marine Transport Lines was an "agent" within the intent of the Public Vessels Act, 46 USC 781-782. The decisive term appears in the following proviso which is engrafted upon that act from the Suits in Admiralty Act, 46 USC 741, 745, both allowing an in personam libel against the United States:

> "... Provided, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the *agent* or employee of the United States ... whose act or omission gave rise to the claim...." (Accent added.)

The District Judge concluded that Marine was such an agent. We hold he was right.

The decision meant that the appellants, Potomac crewman George Thomas Holley and the personal representative of crewman John C. Smith, could not sue Marine, but could sue only the United States, for damages for injury to Holley and the death of John Smith. These misfortunes, they charged, were the result of a fire and explosion, caused by Marine's negligence, aboard the Potomac at Morehead City, North Carolina, September 26, 1961. The vessel was a complete loss, the cost to refloat and repair exceeding her value.

Appellants' complaint is that the ruling of the District Judge deprived them of the jury trial guaranteed by the Jones Act, 46 USC 688, for now their only recourse is a suit against the Government under the Public Vessels Act before the admiralty judge. The issue arose in proceedings initiated by the United States and Marine for exoneration or limitation of liability for the catastrophe.

46 USC 183 et seq.; Supreme Court Admiralty Rule 51. Prosecution in any other forum against the United States and Marine of claims arising from the disaster was restrained. Each of the claimants moved for modification of the injunction to allow them to file actions elsewhere, under the Jones Act with a jury trial, against Marine in the event exemption, exoneration or limitation were denied Marine. Save to permit the filing of protective suits against the bar of time pending determination of the issue here, the District Court denied the motions. From that ruling this appeal is prosecuted; it was allowed by special leave under 28 USC 1292(b).

The Potomac, a Navy tanker owned by the United States, was a public vessel. Employed exclusively in hauling petroleum products to various military bases for national defense, she was under the direction and control of the Military Sea Transportation Service (MSTS). Subject to the other provisions of the contract with the Government, which was dated June 22, 1961, Marine undertook to "*manage and conduct the business regarding the operation* of such tankers", including the Potomac, "as may be furnished to it by the Government from time to time. . . ."

Contrary to claimant-appellants' assertion that Marine was in control of the vessel as a principal and not as an agent, we think the relevant portions of the agreement clearly demonstrate that the United States remained in control of the vessel at all times, with only her physical conduct delegated to Marine. In this Marine was acting solely as the Government's agent, an agent within the intent of the Public Vessels Act. With the particularly relevant portions emphasized, the key paragraphs are these:

> "(b) The Contractor undertakes and promises to manage and conduct the business of the Government with respect to such tankers in *accordance with such written directions or orders as to voyages and car-*

goes as the Government may from time to time prescribe, and upon the terms and conditions herein provided, . . . Commander Military Sea Transportation Service will issue to each Contractor operating instructions, which may be revised and supplemented from time to time. *The Contractor shall authorize the Master of each tanker,* in the Contractor's behalf, *to receive and carry out orders, directions or instructions as regards employment of the vessel and prosecution of voyages, which may be issued by Commander Military Sea Transportation Service, . . .*" Article 1.

"All tankers utilized in the operation of the contract are owned by the Government and are *public vessels.* . . . Article 2.

"(a) The Contractor shall operate the tankers in such services as the Government by written or telegraphic order may direct, . . .

"(b) The Contractor shall equip, fuel, supply, maintain, *man, victual and navigate* the tankers.

"(c) The Contractor shall procure all personnel necessary to fill the complement of each tanker subject to the limitations listed below:

* * *

"(2) Any Master or Chief Engineer so procured and the compensation to be paid therefor shall be subject to approval by the Contracting Officer . . .

* * *

"(6) . . . no deck or engineer officer shall be employed on any tanker unless he is a *member of the United States Naval Reserve* . . .

* * *

> "(9) The officers and members of the crew shall be subject only to orders of the Master or Contractor. All personnel of the Contractor employed in the performance of work under this contract, including the Master, other officers and crew members *shall be employees of the Contractor* at all times and not of the Government." Article 5. (All accent added.)

With its compensation put on a fixed fee basis, the Contractor was to be reimbursed for the costs incurred in the management and maintenance of the tanker. A part of the allowable costs were these:

> "(i) Crew expenditures accruing during the term hereof in connection with the tankers hereunder, including
>
> (a) Wages . . . , *damages or compensation for death or personal injury* . . ." Article 8. (Accent added.)

Insurance, the agreement directed, was to be taken out by the Contractor if required by the Government. In addition to its covenant to indemnify the Contractor for an uninsured responsibility, the Government was to be the dominus litis in the defense of all *uninsured* claims against the Contractor. Thus it was agreed that:

> "(b) The contractor shall be reimbursed by the Government (1) for the cost of such insurance as may be required or approved by the Government; and (2) for liabilities of the Contractor to third parties . . . for . . . *death or bodily injury not compensated by insurance or otherwise,* arising out of the operation of the tankers in the performance of this contract, whether or not such liabilities are caused by the

negligence of the Contractor, . . . provided such liabilities are represented by *final judgments* . . .

• • •

"(d) The Contractor shall give the Government immediate notice of any suit or action filed, or any claim made, against the Contractor arising out of the performance of this contract, the cost and expense of which is reimbursable to the Contractor under the provisions of this contract, and the risk of which is then *uninsured* or in which the amount claimed exceeds the amount of insurance coverage . . . If the liability is *not insured,* the Contractor shall, if required by the Government authorize representatives of the Government to settle or defend any such claim and to represent the Contractor in or take charge of any litigation in connection therewith.

"(e) . . . *all officers and members of the crew of said tankers . . . shall be deemed to be third parties, and not employees of the Government.*" Article 14. (Accent added)

Article 29 expressly *empowered the Government to terminate the employment of the master or any member of the crew* whose continued retention was considered prejudicial to the interest of the United States.

The Operating Instructions, which the Commander MSTS issued to the Contractor pursuant to the contract, further accent the constant control of the Government, with Marine only to run the ship as its agent. Specifying explicitly and in detail the responsibilities of the Contractor, they begin with the requirement that the ship carry the certificate of the Navy Secretary declaring the ship's status as a public vessel. They stress the continuing national character of the ship, underscoring the entitlement

of the vessel to all the sovereign immunities and privileges of any Navy ship, including those of international and diplomatic stature, which Marine on its own could neither enjoy nor insist upon.

Just how the respective positions of the Government as principal, and Marine as agent, could have been drawn more distinctly is not readily conceivable. While there may be a variation in the interrelation of the crew and the Government in the two agreements, the present contract structures no less an agency than that constituted by the contract considered in Cosmopolitan Co. v. McAllister, 337 U. S. 783 (1949), and there held to retain for the Government the same control which we now find. On this precedent we found in Williams v. United States, 228 F. 2d 129 (4 Cir. 1955) cert. den. 351 U. S. 986, the physical operator of the Government ship to be such an agent as the Public Vessels Act declares immune from suit.

The argument of the claimants that by the agreement Marine was, in effect, shipowner as well as the crew's employer rests on their interpretation of the contract as a splicing of two charter parties; a bare-boat charter out of the Government to Marine with a time charter back from Marine to the Government. The result, say the appellants, is not simply Marine's appointment as an agent but rather its creation as a charterer, an owner pro hac vice or other independent contractor with the same incidents of possession and control as an owner. Cf. Reed v. Yaka, 373 U. S. 410, 412 (1963). On these premises it is said that Marine is subject to suit under the Jones Act before a jury, should exoneration or limitation not be granted Marine.

As proof of their argument claimants refer primarily to the contract stipulations that the ship's company shall not be considered employees of, but rather as third parties towards, the Government. The very terms of the present contract, claimants contend, were deliberately and intentionally chosen to remove the crewmen from the classifica-

tion of Government employees, so as to reserve to them all the subsisting remedies of seaman as against Marine. The current contract, they aver, was substituted for the previous General Agency Agreement to avoid this classification, for that agreement put the ship's complement in the objectionable category. Cosmopolitan Co. v. McAllister, supra, 337 U. S. 783; Hanlon v. Waterman Steamship Corporation, 265 F. 2d 206 (2 Cir. 1959), cert. den. 361 U. S. 822; Williams v. United States, supra, 228 F. 2d 129 (4 Cir. 1955).

Appellants are mistaken. Whether the agreement constituted Marine a charterer, an owner pro hac vice or an independent contractor is merely an academic ascertainment. In any of these capacities Marine could still be an agent. An owner pro hac vice is a charterer, and its competency to act as an operating agent has been expressly recognized. Reed v. Yaka, supra, 373 U. S. 410, 412; U. S. Shipping Board Emergency Fleet Corp. v. Greenwald, 16 F. 2d 948, 951 (2 Cir. 1927). An independent contractor too may be an agent; the terms are not mutually exclusive. Restatement, Agency, 2d., § 14N. However acting, Marine could sign on sailors as its employees. But the question here is not whether the Potomac's crew were employees of Marine, nor whether Marine is to be categorized as a bareboat or time charterer, an owner pro hac vice, or an independent contractor. Indeed, the contract may have established a relation sui generis, not fitting into any of these terminologies, but that, again, is not the issue. The question now determinative is whether Marine was an "agent".

The desired alteration of the seaman's status was achieved, certainly in part, in the new form of contract by the express provision that they should not be employees of the United States. The change benefitted the seamen in that it confirmed that they should not be restricted, as Government employees, to relief under the Federal Employees Compensation Act, 5 USC §§ 751-803. They have still, by

virtue of the Public Vessels Act, the traditional remedies of seamen, as well as suit under the Jones Act, but these are now enforceable against the Government in the place of the actual navigator of the vessel. Thus the seamen are assured a solvent respondent. However, the innovation did not affect, or purport to affect, the relationship between the Government and the manager of its ship, that is of principal and agent.

The intent of the 1950 amendment to the Suits in Admiralty Act, promulgating the proviso excluding the agent from suability, was not to keep alive the liability of a private person, firm or corporation having charge of a Government ship. It was just to the contrary. It was the adoption by Congress of the exclusivity principle enunciated in Cosmopolitan Co. v. McAllister, supra, 337 U. S. 783. Another purpose was to designate unequivocally the one to whom a claim for loss caused by the Government's ship should be directed, and to afford extra time for suit by those who had before erroneously proceeded against the contractor. The legislative history avows this intent and object of the Act. Sen. Rep. No. 1782, 81st Cong., 2d Sess. (1950); 1950 U. S. Code Cong. Service, p. 4209. As we find MSTS has not endeavored to do so instantly, the question is not before us of whether it can legally execute a contract in which the manager of the ship is not the Government's agent and so without the immunity conferred by the 1950 Amendment. Cf. 10 USC 2306(a) and 32 CFR 1.401(c) and 1.402.

Marine's recourse to the limitation statute, even with the joinder of the United States, does not concede or imply that Marine was the principal rather than an agent in the ship's management. The statute contemplates access to the limitation proceeding for the resolution of doubts as to liability as well as the determination of the extent of it. See British Transport Commission v. United States, 354 U. S. 129 (1957); Starr Brick Corp. v. Johnson, 262 F. 2d

251 (2 Cir. 1959); Petition of Spearin, Preston & Burrows, 190 F. 2d 684, 686 (2 Cir. 1951). Indeed, claimants' attribution of character or owner pro hac vice to Marine vouches it as one privileged to seek the lee of the limitations act, for the statute expressly harbors charterers who, like Marine, "man, victual and navigate" the vessel. 46 USC 186. That it was a haven the Potomac might enter is acknowledged by the authority the appellants cite. Petition of the United States, 155 F. Supp. 714 (D. Del.), affirmed 259 F. 2d 608 (3 Cir. 1958).

Continuance under the contract of the immunity accorded the agent by the statute is not put in doubt by the fact that *judgments* against Marine have, with the knowledge of the United States, been entered for personal injuries or other liabilities. E.g. Chowaniec v. United States (S. D. N. Y. 1956) 149 F. Supp. 251. The fact is, too, that the agreement speaks of "judgments" which might be rendered against Marine in the course of the contract. But in the same context the agreement provides for acceptance of the agent's "settlements approved in writing by the Government". This tolerance and these provisions merely indicate that the Government has or may allow judgments against Marine as fair ascertainments of the amounts for which the agent seeks reimbursement. In no event, however, could the Public Vessels Act be nullified by practice or agreement.

Congress unquestionably had the power to withhold from a crewman shipping on a publicly owned, but privately managed, cargo vessel the right to sue the contractor. Anniston Manufacturing Co. v. Davis, 301 U. S. 337, 341-343 (1937); Crowell v. Benson, 285 U. S. 22, 45 (1932). The evident reason for the exemption is that, as the United States binds itself to hold the agents harmless against liabilities arising in the conduct of the ships, it is in reality the respondent to all such claims. For the same reason a

jury trial is withheld, the United States seldom leaving to a jury the determination of the sum to be assessed for its liability. The withdrawal of a jury trial is altogether permissible. Maricopa County v. Valley National Bank, 318 U. S. 357 (1943); Lynch v. United States, 292 U. S. 571 (1934).

Our conclusion is that Marine should now be declared exonerated, by reason of the statute, of any liability to the appellant-claimants. As this in effect was the conclusion of the District Court, its judgment will be affirmed.

Affirmed.

J. SPENCER BELL, Circuit Judge, dissenting:

I cannot agree with the majority because I do not construe the Suits in Admiralty Act as barring recovery in this case against Marine Transport Lines, Inc. [hereinafter Marine]. Certainly, I cannot agree with the assertion of the district court that the exclusivity provisions of that Act may, at the option of the Government, be made applicable when the total claims exceed the amount of the insurance coverage. This would place an intolerable burden upon claimants who would have no way of ascertaining either from public statutes or regulations who is a proper party defendant before suit is brought.[1] Furthermore, the

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[1] In *Chowaniec v. United States*, 149 F. Supp. 251 (S. D. N. Y. 1956), a seaman brought a proceeding in admiralty against the Government and a Jones Act suit against Marine. Finding no unseaworthiness, the district court dismissed as to the United States but held Marine under the Jones Act for negligence. The court found that Marine operated, managed, and controlled the vessel under a contract with the owner and hence was liable under the Jones Act. In failing to assert the exclusivity provisions of the Suits in Admiralty Act in that case, Marine and the Government took a position inconsistent with the Government's argument here that this is a jurisdictional matter, *i.e.*, that the Military Sea Transportation Service (MSTS) could not by the terms of this contract take the case out of the exclusivity provisions of the Act.

majority consoles the claimants in the instant case with the reminder that the United States is a solvent respondent, but it ignores the fact that they are being denied some of the benefits of a Jones Act suit, including the invaluable right to a jury trial.

46 U. S. C. A. § 781 provides that a libel in personam may be brought against the United States in cases involving public vessels, and 46 U. S. C. A. § 782 incorporates in the Public Vessels Act the provisions of the Suits in Admiralty Act. 46 U. S. C. A. § 742 makes a libel in personam against the United States available in any case in which a proceeding in admiralty could have been maintained against a privately owned vessel had it been involved. 46 U. S. C. A. § 741 provides, however, that no public vessel or government cargo may be seized or attached. 46 U. S. C. A. § 745 places a two year statute of limitations upon a libel in personam against the United States and further reads:

> "*Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States . . . whose act or omission gave rise to the claim . . ."

It is my understanding, from these statutes, that a libel in personam may be brought against the United States where a public vessel is involved and that if the injury is caused by an agent or employee of the United States, the remedy against the United States is exclusive, *i.e.*, the agent or employee may not be sued. I cannot read these statutes as saying that a suit may not be brought against an independent contractor engaged in business with the United States, even if he is using a public vessel and his business involves the public defense. I reach this conclusion not only from the cases construing the Act and its

legislative history[2] but also from the large number of cases dealing with the same problem in other fields of military and naval defense procurement.

In 1961, when the contract involved in the instant litigation was entered into, the parties thereto were well aware of the Supreme Court's decision in 1949 in the *Cosmopolitan* case.[3] They knew, as a result of that decision, that they could predetermine by the terms of their contract the respective liabilities of the Government and the operator for negligence resulting in an injury to a seaman aboard a vessel owned but not operated by the Government. They also knew that in 1950 Congress had codified the result of the *Cosmopolitan* case by enacting the exclusivity provision of the Suits in Admiralty Act which I have heretofore quoted. Furthermore, they were thoroughly familiar with the terms of the old General Agency Agreement and the shipping articles which were construed by the Court in *Cosmopolitan*. In *Cosmopolitan* the court stressed the absence of any demise from the Government. The contract here in article 1(a) states: "The Contractor . . . shall manage and conduct the business regarding the operation of such tankers as may be furnished to it by the Government from time to time. . . ." This is the language of a demise. In *Cosmopolitan* the language of the old General Agency Agreement contained no limitation as to voyages and cargo;

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[2] In presenting the 1950 amendment to the Suits in Admiralty Act, which added the exclusivity provision in 46 U. S. C. A. § 745, the report by the Senate Committee on the Judiciary contained this language:

> "This bill will not in any way change the existing rights of seamen, under either the Jones Act or the general maritime law, to bring suits in admiralty or at law against their private employers who operate, under bare-boat charter or similar arrangements, vessels which are merely owned by the Government." S. Rep. No. 2535, 81st Cong., 2d Sess. (1950), 1951 Am. Mar. Cases 149-50.

[3] *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783 (1949).

instead it used straight agency language. In this contract article 1(b) states that "the Contractor undertakes to manage and conduct the business of the Government . . . as to voyages and cargoes as the Government may from time to time prescribed. . . ." This is time charter language. In *Cosmopolitan* the court stressed the shipping articles which provided that the seamen were employees of the Government. In this contract it is explicitly provided that the seamen are to be employees of Marine and *not* of the Government. The parties here were also aware of the line of cases including *Hanlon* v. *Waterman S. S. Co.*, 265 F. 2d 206 (2 Cir.), *cert. denied*, 361 U. S. 822 (1959); *Williams* v. *United States*, 228 F. 2d 129 (4 Cir. 1955), *cert. denied*, 351 U. S. 986 (1956); and *Atlantic Coast Line R. R. Co.* v. *Agwilines, Inc.*, 195 F. 2d 459 (5 Cir. 1952), holding that where the Suits in Admiralty Act was applicable, suit would have to be brought against the United States alone. In the very teeth of the decisions in *Cosmopolitan* and these other cases, the Government contracting agency proceeded to draft the contract involved in this case, a document which contains the language of bareboat charter out/time charter in, which carefully avoids the term "agent" or "agency" and substitutes therefor the word "contractor," and finally which expressly provides that the seamen shall not be employees of the Government.

The parties to the present contract also knew that Congress had given to the Secretary and the Assistant Secretary of the Navy authority in negotiating procurement contracts for goods and services for the national defense to "make any kind of contract that he considers will promote the best interests of the United States,"[4] with certain limi-

[4] It has long been the policy of the Government and the Department of Defense to foster and encourage free enterprise and private business in public defense activities. *Cf. Powell* v. *United States Cartridge Co.*, 339 U. S. 497 (1950), where the Court held that the employees of a private contractor operating a Government-owned munitions plant under a cost plus a fixed fee contract were not em-

tations not pertinent here. See 10 U. S. C. A. § 2306(a). In implementing this authority, certain governmental policies were spelled out and appear in 32 C. F. R. § 1.1402 (1961):

> "It is the policy of the Department of Defense . . . to encourage and foster the American merchant marine. Where transportation of supplies by ocean vessels is required:
>
> "(a) Private United States vessels shall be employed for the transportation of at least 50 percent of the aggregate gross tonnage per annum of the following categories of supplies. . . . ."

Section 1.1401(e) defines private vessels to include "Government-owned vessels under bareboat charter to private operators."

For the reasons previously set forth and in reliance primarily upon Judge Wright's analysis, referred to hereinafter, I think the language of this contract expresses the intent of the parties to create the relationship of independent contractor and that it did in fact create such a relation-

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ployees of the Government within the meaning of the Fair Labor Standards Act. The Court said there:

> "we find in these contracts a reflection of the fundamental policy of the Government to . . . use as much as possible (in the production of munitions) the experience in mass production and the genius for organization that has made American industry outstanding in the world. The essence of this policy called for private, rather than public, operation of war production plants. . . . In this light, the Government deliberately sought to insure private operation of its new munitions plants." 339 U. S. at 506-07.

See also *Anselmo* v. *Ailes*, 235 F. Supp. 203 (E. D. N. Y. 1964), where the court held that United States was not responsible for the alleged wrongful discharge of certain employees at a missile base merely because it had inserted many detailed rights of supervision in the contract to insure that the contract was properly performed and that its money was not wasted.

ship between Marine and the Government. In *Petition of the United States,* 155 F. Supp. 714 (D. Del. 1957), Judge Caleb M. Wright painstakingly and meticulously analyzed a contract which is conceded by both parties here to be in all relevant particulars the same as the contract in this case. He came to the conclusion that the petitioner in that case, who stood in the shoes of Marine here, was a "charterer" or "owner pro hac vice" under the contract. I can add nothing to the able opinion of Judge Wright except to say that his ruling was affirmed by the Third Circuit, 259 F. 2d 608 (1958), in an opinion which quoted the district judge at length and affirmed him in every particular. Judge Wright's opinion was supported by an able brief filed by the Government which pointed out that

> "This new MSTS [5] combination bareboat charter-out/time charter-back form of charter agreement . . . makes plain that the vessel is demised and delivered into Mathiasen's control to man, victual, command and navigate by its own expense and procurement, although subject to reimbursement and profit for the service of carrying government cargoes."

The brief concludes:

> "These demise charter provisions make it absolutely clear, as Judge Wright held, that Mathiasen was an owner pro hac vice and a 'charterer' within 46 U. S. C. 186 and entitled to the benefits of the limitations acts."

The claimants in that case raised and the court rejected the same arguments which the Government here advances and this court has accepted in support of the opposite position.

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[5] Under the regulations it is the function of MSTS, under whose aegis the contract in this case was made, to coordinate all shipping relating to national defense.

I find the Government's former reasoning far more convincing.

I think the Public Vessels Act is applicable and thus no question of the waiver of sovereign immunity is here involved, for a public vessel may not be attached or seized even in a collision case. However, the exclusivity feature of the 1950 amendment is not applicable for the reasons I have outlined above. I would not permit Marine to enjoy the privilege of a private operation, including the fixed fee which this contract so clearly grants it, while denying the concomitant rights to its employees, the claimants in this case.

Memorandum of United States District Court for the Eastern District of North Carolina, New Bern Division

Admiralty No. 278

In the Matter of

The Petition of the UNITED STATES OF AMERICA and MARINE TRANSPORT LINES, INC., as owners of the USNS POTOMAC, for exoneration from or limitation of liability.

On September 26, 1961, the USNS POTOMAC, titled in the name of the United States of America, was discharging fuel oil at the Aviation Fuel Terminals in Morehead City, North Carolina. A fire broke out and, followed by several explosions, the vessel was a constructive total loss. After the institution of several actions in the Eastern District of Virginia by allegedly injured seamen employed aboard the vessel, the matters were transferred to the Eastern District of North Carolina where, in due time, the instant limitation proceeding was commenced by the United States of America

and Marine Transport Lines, Inc., as the remains of the POTOMAC were in this latter jurisdiction.

In the limitation petition filed herein, it is stated in part:

> "SECOND: That petitioner Marine Transport Lines, Inc., was at all times material hereto and now is a corporation duly organized and existing pursuant to the laws of the State of Delaware, and owner pro hac vice and operator of the United States Naval Ship POTOMAC, which at all material times operated said vessel as a public vessel of the United States for and on behalf of the United States Navy as operating agent and owner pro hac vice pursuant to contract whereby the said Marine Transport Lines, Inc., manned, victualled, supplied, operated and navigated the said USNS POTOMAC at its own expense and by its own procurement, and was owner and charterer of the USNS POTOMAC within the meaning of 46 U. S. C. § 183-189."

In response to the monition issued on said petition approximately 38 claims aggregating $2,100,000.00 were filed. Many of these claims were dismissed, either in whole or in part, at the time of the eleven-day trial conducted at New Bern, North Carolina, commencing March 11, 1963. The official reporter who recorded the proceedings is no longer employed by the federal government and, while proctors and the court are hopefully awaiting the transcript, prospects for delivery of same are not in the immediate future.

The POTOMAC has no value for limitation purposes as it is obvious that the costs of salvage will far exceed her scrap value. Assuming that the provisions of 46 U. S. C. § 183(b) are applicable, the available fund for death and personal injury claimants will be slightly in excess of

$900,000.00, computed on 15,626 gross tons. On paper at least, the case presents a multiple claim inadequate fund limitation proceeding although, with several exceptions, many of the claims may be considered excessive.

Two seamen, Smith and Holley, filed admiralty actions in the United States District Court for the Eastern District of Virginia shortly after the fire. As noted, these cases were transferred to the Eastern District of North Carolina. Smith became ill and subsequently died on December 2, 1961, apparently prior to the transfer. His administratrix qualified in a Florida court and has heretofore instituted an action in this court against Aviation Fuel Terminals, which proceeding has been held in abeyance as Aviation Fuel Terminals was an active party in the limitation trial. At the final pretrial conference held approximately 40 days prior to trial, proctors for Smith's administratrix notified the court and all proctors that a request would be made to modify the injunctive order of March 26, 1962, which stayed and restrained the institution and prosecution of any legal proceedings, except in the proceeding for exoneration from or limitation of liability. A formal motion requesting such modification to permit Smith's claim to be instituted against Marine Transport Lines, Inc., under the Jones Act in another forum was filed at the time of trial. The claimant Holley, while not having advised the court prior to trial, likewise indicated a desire to bring a Jones Act suit against Marine Transport Lines, Inc., in another forum and has now filed a similar motion.

While there may be some doubt as to the propriety of instituting actions against Marine Transport Lines, Inc., in the forums suggested by proctors,[1] it is abundantly clear that, but for the limitation proceeding and the ques-

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[1] *Leith* v. *Oil Transport Company*, 3 Cir., 321 F. (2d) 591, discussing the venue provisions of the Jones Act.

tion raised by the government that the POTOMAC is a public vessel and any action must be brought under the Public Vessel's Act, these claimants could maintain actions under the Jones Act against their employer, Marine Transport Lines, Inc. With the three year statute of limitations rapidly running, should the court now grant a modification of the order to at least permit these two claimants to file Jones Act proceedings in an appropriate forum? We think this question should be answered in the negative under the particular facts of this case, subject to a modification under specific conditions to permit the claimants to institute Jones Act proceedings pending an appeal from an interlocutory order to be entered in accordance with this memorandum.

It is fundamental that, if a Jones Act proceeding is to be instituted, it must be commenced within the statutory period of three years from the date of injury or, in the event of death, within three years from the date of death. The filing of a limitation proceeding does not toll the statute. It is for this reason that the court is willing to modify the injunctive order to permit the claimants to file appropriate actions in other forums, conditioned that the claimants will dismiss such actions without prejudice in the event an appeal from the present ruling is affirmed, in which event the claimants may then proceed in this limitation proceeding. Of course, if the decision of this court is reversed on appeal from the interlocutory order, such action will have the effect of further modifying the injunctive order and thereby permit the claimants to proceed against Marine Transport Lines, Inc., in the selected forum.

There is reputable authority justifying the modification of injunctive orders to permit the filing of actions at law under the Jones Act in matters not involving public vessels. *In re Wood's Petition*, 2 Cir., 230 F. (2d) 197; *Pershing Auto Rentals, Inc.* v. *Gaffney*, 5 Cir., 279 F. (2d) 546,

Cf. *Moore-McCormack Lines, Inc.* v. *Richardson,* 2 Cir., 295 F. (2d) 583. We do not reach consideration of the discretionary power of the court in such instances. Nor is it appropriate to discuss the authorities relied upon by the government in urging that admiralty should determine all of the claims. *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207; *British Transport Commission* v. *United States,* 354 U. S. 129.

The controlling question is, we think, one of interpretation of the contract between the United States of America and Marine Transport Lines, Inc., dated June 22, 1961. Do the methods of operation provided therein come within the familiar rule of *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783? In that case the court said (337 U. S. 795):

> "The solution of the problem of determining the employer under such a contract depends upon determining whose enterprise the operation of the vessel was. Such words as employer, agent, independent contractor are not decisive. No single phrase can be said to determine the employer. One must look at the venture as a whole. Whose orders controlled the master and the crew? Whose money paid their wages? Who hired the crew? Whose initiative and judgment chose the route and the ports? It is in the light of these basic considerations that one must read the contract. No evidence has come to our attention that indicates the general agent ever undertook to give orders or directions as to route or management of the ship while on voyage."

The remedy available to any person injured or killed aboard a public vessel is under the Public Vessels Act, 46 U. S. C. §§ 781-790, incorporating by reference the Suits in Admiralty Act, 46 U. S. C. §§ 741-752. The 1950 amendment of 46 U. S. C. § 745 now provides-

> "That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action

by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim."

While the identical contract now presented was not before the court in *Williams* v. *United States,* 133 F. Supp. 317, aff'd. 4 Cir., 228 F. (2d) 129, cert. den. 351 U. S. 986, there are similarities in line with *Cosmopolitan Shipping Co.* v. *McAllister, supra,* which manifestly demonstrate that the enterprise was that of the United States of America. Assuming arguendo that the cause of the fire and explosion was due to negligence of the master or crew of the USNS POTOMAC or the unseaworthiness of said vessel, there is nothing that Marine Transport Lines did, or failed to do, for which the United States is not subject to direct liability under the Public Vessels Act.

Analyzing the contract in question, we find:

(1) Marine Transport agreed to manage and conduct the business regarding the operation of certain tankers, including the USNS POTOMAC, in accordance with written directions or orders as to voyages and cargoes as the government prescribed.

(2) Marine Transport authorized the master of each tanker to carry out all orders, directions or instructions regarding the employment of the vessel and prosecution of voyages as issued by the Commander MSTS.

(3) All tankers are declared to be owned by the government as public vessels, and are employed solely in the public use or in the protection of the national interest or economy.

(4) Marine Transport, at the cost and expense of the government, was obligated to equip, fuel, supply, maintain,

man, victual and navigate the tanker. Any master or chief engineer so procured by Marine Transport, and the compensation paid to such officers, was subject to the approval of the government. Any master, deck or engineer officer was required to become a member of the United States Naval Reserve to serve aboard a tanker.

(5) Marine Transport agreed to procure other licensed and unlicensed personnel through usual channels in accordance with customary practices in commercial operations.[2] All licensed officers and no less than ninety percent of the crew employed on the tanker were required to be United States citizens.

(6) The officers and crew were subject only to orders of the master and Marine Transport. It is specifically provided that the master, officers and crew members are employees of Marine Transport and not of the government.

(7) Labor agreements covering the operation of tankers are subject to approval by the government.

(8) Marine Transport agreed to maintain its accounting procedures subject to the approval of the Contract Audit Division of the Comptroller of the Navy.

(9) Marine Transport is paid by the government a fixed fee per day for the operation of a tanker, same covering management expense and profit.

(10) Marine Transport is paid by the government a post-redelivery fee for each tanker.

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[2] The ship's Articles were destroyed in the fire. The court assumes that the crew signed aboard the vessel on standard articles on a form customarily used by Marine Transport Lines in its regular commercial activities, and that the interest of the government is not shown on the face of the articles.

(11) Marine Transport is reimbursed by the government all allowable cost of operating and maintaining the tanker. Such items of allowable costs include (a) crew wages, (b) Social Security and unemployment taxes, (c) contributions to a pension fund, (d) sales taxes and foreign taxes, if not otherwise immune from same, (e) cost of insurance acquired at direction of the government,[3] (f) travel expense, (g) cost of communications, (h) overtime compensation paid to ship's personnel to the extent provided by ship's articles or labor agreements approved by the government.

(12) All funds paid by the government to Marine Transport (excepting the fixed fee and post-redelivery fee) were required to be deposited in a segregated bank account.

(13) Title to all property furnished by the government, or reimbursable as a cost item, vested in the government upon delivery by the vendor. Such property could be used only for the performance of the contract.

(14) Marine Transport could not be held liable for loss or damage of government property except for (a) wilful misconduct or lack of good faith, (b) such loss or damage as resulted from a risk expressly required to be insured under the contract, but only to the extent of the insurance so required and maintained.

(15) All agents and subcontractors selected by Marine Transport are subject to disapproval by the government.

(16) The government assumed the risk of loss of, or damage to, any tanker or cargo, any other vessels, cargoes, piers, shore installation, etc., owned by the government,

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[3] The extent of insurance carried by Marine Transport in connection with its operation of the USNS POTOMAC is unknown. Obviously the potential liability far exceeds the coverage. In such instances it frequently occurs that the government takes over the entire defense, thereby using the coverage afforded.

whether caused by the negligence of Marine Transport, its agents, servants or employees, to the extent that such loss is not compensated by insurance required or approved by the government, and Marine Transport is declared to be not liable for any loss or damage in excess of the amount of insurance.

(17) As to claims of third parties, all officers and members of the crew are deemed to be third parties and not employees of the government. Provision is made for liability insurance as a cost to be reimbursed by the government. Within the extent of the insurance coverage certain procedures are set up for the defense and settlement of third party claims.[4]

(18) The customary provision relating to non-discrimination in employment by Marine Transport is contained within the contract.

(19) The government retains the right to order Marine Transport to terminate the employment of any master or member of the crew whenever the employment or continued employment is deemed to be prejudicial to the interests or endangers the security of the United States.

(20) During the existence of the contract, all of the directors and principal officers of Marine Transport are required to be citizens of the United States; and at least 75% of its outstanding stock is required to be owned and controlled by citizens of this country.

(21) No supplies or services originating from sources within Soviet-controlled areas can be used in the perform-

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[4] The court assumes that the third party coverage is far exceeded in this case. If such is not a fact, the court will grant a hearing to ascertain this factual situation. The conclusion herein reached is not necessarily applicable to third party claims within the limits of coverage afforded.

ance of the contract without written approval of the government.

Manifestly the USNS POTOMAC was owned, controlled and operated by the government. True, the officers and crew members were employed by Marine Transport, but their duties wer indirectly controlled by the government through an agency which operated under a cost-plus-fixed-fee contract. Marine Transport was in no sense a charterer of the POTOMAC. The vessel was engaged in carrying military fuel cargoes on national defense missions. Looking at the venture as a whole, it was a government undertaking and the government is liable, if at all, for the acts or omissions of Marine Transport.

Subject to the comments hereinabove indicated, an order may be presented consistent with this memorandum. The conditions of any modification of the injunctive decree, if accepted by the claimants, will be limited solely to the extent of permitting actions to be instituted in other forums to protect the running of the statute of limitations. An appeal from the interlocutory order will be certified to the United States Court of Appeals for the Fourth Circuit if and when the conditions of modification are accepted by the claimants and, if not accepted, the motion to modify the injunctive order will be denied.

By reason of the inability to secure the official transcript for the purpose of perfecting an appeal from the interlocutory order to be prepared and presented by proctor for the United States, the court will supplement this memorandum by any essential findings or conclusions omitted herein, and the court has marked as petitioner's exhibits "X" and "Y" the contract documents forwarded for the purpose of considering the motions as filed by the claimants Smith and Holley.

(SGD) WALTER E. HOFFMAN,
United States District Judge.

Norfolk, Virginia
April 8, 1964

Mandate of United States Court of Appeals for the Fourth Circuit

DECREE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9704

SARAH SMITH, Administrator of the Estate of JOHN C. SMITH, Deceased, and GEORGE THOMAS HOLLEY,
Appellants,

vs.

UNITED STATES OF AMERICA and MARINE TRANSPORT LINES, INC., as owners of the USNS POTOMAC, for exoneration from or limitation of liability,
Appellees.

APPEAL FROM the United States District Court for the Eastern District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

May 3rd, 1965.

s/ ALBERT V. BRYAN,
United States Circuit Judge.

Filed May 3, 1965.
MAURICE S. DEAN,
Clerk.

Order of United States District Court for the Eastern District of North Carolina, New Bern Division, Denying Motions to Modify Order Restraining Suits

No. 278 In Admiralty

In the Matter of

The Petition of the United States of America and Marine Transport Lines, Inc., as owners of the USNS Potomac, for exoneration from or limitation of liability.

This cause having come on to be heard on the motions of claimant Sarah Smith, Administratrix of the Estate of John C. Smith, and of claimant George Holley to modify the order entered herein on March 26, 1962, restraining the institution and prosecution of suits against petitioners or either of them, so as to permit the institution of suits at law by said claimants against petitioner Marine Transport Lines, Inc., in other forums, and this Court having, on April 8, 1964, entered its memorandum opinion denying said motions and counsel for the respective claimants having noted hereon their acceptance of the conditions hereinafter set forth, it is for the reasons stated in said opinion hereby

Ordered that the motions of claimant Sarah Smith, Administratrix of the Estate of John C. Smith, and of claimant George Holley, and each of them, to modify the order entered herein on March 26, 1962, restraining the institution and prosecution of suits against petitioners, or either of them, be and the same hereby are denied; and it is further

Order of United States District Court for the Eastern District of North Carolina, New Bern Division, Denying Motions to Modify Order Restraining Suits

ORDERED that, solely for the purpose of permitting claimant Sarah Smith, Administratrix of the Estate of John C. Smith, to preserve her rights against expiration of the applicable limitation period, pending an appeal by said claimant from this order, the order entered herein on March 26, 1962, restraining such suits be and the same hereby is modified to the extent of permitting claimant Sarah Smith, Administratrix, to file an independent protective suit aaginst petitioner Marine Transport Lines, Inc., pending appeal, subject to the terms and conditions hereinafter set forth; and it is further

ORDERED that, solely for the purpose of permitting claimant George Holley to preserve his rights against expiration of the applicable limitation period, pending an appeal by said claimant from this order, the order entered herein on March 26, 1962, restraining such suits be and the same hereby is modified to the extent of permitting Claimant George Holley to file an independent protective suit against petitioner Marine Transport Lines, Inc., pending appeal, subject to the terms and conditions hereinafter set forth; and it is further

ORDERED that the aforesaid modification of the order restraining suits to the extent of permitting the said claimants to file protective suits against petitioner Marine Transport Lines, Inc., pending appeal be and the same hereby is granted subject to the following terms and conditions:

(1) neither claimant shall file such a protective suit without having first filed an application for an interloctory appeal from this order or a notice of appeal from this order to the Court of Appeals;

Order of United States District Court for the Eastern District of North Carolina, New Bern Division, Denying Motions to Modify Order Restraining Suits

(2) the respective claimants and each of them shall discontinue and dismiss any such protective suit without prejudice if this order is ultimately affirmed after exhaustion of all appellate remedies;

(3) neither claimant shall further prosecute in any manner any such protective suit unless and until expressly permitted by the further order of this Court;

(4) the respective claimants and each of them shall in the event this order is reversed or modified on appeal prosecute said protective suits only on such terms and conditions as may hereinafter be imposed by the further order of this Court; and

(5) the respective claimants and each of them shall attach a copy of this order to and make reference thereto in any complaint, libel, pleading or summons by which any such protective suit shall be commenced in any other forum; and it is further

ORDERED that the prosecution of any independent protective suit against petitioner Marine Transport Lines, Inc., commenced pursuant to this order be and the same hereby is stayed and restrained unless and until expressly permitted by the further order of this Court; and it is further

STATED AND CERTIFIED that in the opinion of this Court this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation, since affirmance of this order will preclude further litigation outside this limitation of liability proceeding, no matter what determination may hereafter be made by the Court on the issues of exoneration from and limitation of liability.

Order of United States District Court for the Eastern District of North Carolina, New Bern Division, Denying Motions to Modify Order Restraining Suits

DONE AND ORDERED this 15th day of July, 1964, at Norfolk, Virginia.

/s/ WALTER E. HOFFMAN,
United States District Judge

We hereby accept the terms and conditions on bringing a protective suit imposed by the foregoing order, the substance of said order being objected to.

SCHWARTZ & O'CONNELL,
233 Broadway,
New York, New York 10007.

WILLIAM K. RHODES,
22 Odd Fellows Building,
Wilmington, North Carolina.

/s/ MARVIN SCHWARTZ,
Proctors for claimant Sarah Smith, Administratrix of the Estate of John C. Smith.

We hereby accept the terms and conditions on bringing a protective suit imposed by the foregoing order, the substance of said order being objected to.

AMATO, BABALAS, BREIT, COHEN, RUTTER & FRIEDMAN,
500 Helena Building,
Norfolk, Virginia.

/s/ C. ARTHUR RUTTER, JR.
Proctors for claimant George Holley.

Order of United States District Court for the Eastern District of North Carolina, New Bern Division, Denying Motions to Modify Order Restraining Suits

Approved as to form:

/s/ ALTON T. CUMMINGS,
Asst. United States Attorney,

/s/ WILLIAM E. GWATKIN, III,
Attorney, Admiralty & Shipping
Section, Department of Justice,

Proctors for Petitioners,
UNITED STATES OF AMERICA and
MARINE TRANSPORT LINES, INC.

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Supreme Court of the United States

October Term, 1965

No. 399

SARAH SMITH, as Administratrix of the Estate of JOHN C. SMITH, deceased, and GEORGE THOMAS HOLLEY,
Petitioners,

v.

UNITED STATES OF AMERICA and MARINE TRANSPORT LINES INC., as owners of the USNS POTOMAC,
Respondents.

PETITION AND BRIEF ON BEHALF OF AMERICAN TRIAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

AMERICAN TRIAL LAWYERS ASSOCIATION
By LOUIS R. HAROLDS, ESQ.,
Chairman of the Admiralty Section
Of Counsel and on Brief.

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Supreme Court of the United States

October Term, 1965

No.

SARAH SMITH, as Administratrix of the Estate of JOHN C. SMITH, deceased, and GEORGE THOMAS HOLLEY,
Petitioners,

v.

UNITED STATES OF AMERICA and MARINE TRANSPORT LINES INC., as owners of the USNS POTOMAC,
Respondents.

PETITION AND BRIEF

To the Honorable Justices of the United States Supreme Court:

The American Trial Lawyers Association respectfully joins in the petition for a writ of certiorari and seeks leave to file the within petition and brief in support of same as *amicus curiae,* and respectfully alleges as follows:

1. The American Trial Lawyers Association is a national bar association consisting of more than 15,000 lawyers primarily engaged in the practice of personal injury law.

2. Said Association, and more particularly the members of its Admiralty Section, many of whom are handling related cases, are vitally concerned with the above petition presently before this Honorable Court because of the existence of numerous suits throughout the United States involving civilian merchant seamen, injured aboard vessels such as the USNS Potomac, which are commonly referred to as M.S.T.S. vessels *i.e.*, operated in the Navy Military Sea Transportation Service.

3. Prior to the decision of Honorable Walter E. Hoffman, the United States District Judge who ruled in the instant case, and its affirmance by a divided Court of Appeals, many suits had been filed against the respective private employers of injured merchant seamen, shipping companies which were then deemed and acknowledged by all to be proper party defendants. These firms were designated the operating Contractors pursuant to the express terms of the standard form of agreement for M.S.T.S. vessels entered into between the United States of America and the various private shipping companies. Such suits were filed pursuant to the provisions of the Jones Act (46 U. S. C. § 688), which granted to merchant seamen a right to sue their "employers" in civil actions, with a right to trial by jury; and these were generally filed with alternate claims pursuant to the provisions of the general maritime law based on allegations of unseaworthiness and for related benefits.

4. Prior to the decision of the District Court in the instant case, the private operating companies had generally admitted operation, management and control of such vessels in the various civil jury suits filed to recover damages for shipboard injuries on M.S.T.S. ships, claims which were duly covered by insurance protection.

However, subsequent to the decision of Judge Hoffman in the instant case, and the affirmance thereof by the divided Court of Appeals (for the Fourth Circuit), there resulted a conflict among the circuits, and resultant uncertainty among the lawyers handling such cases.

It is respectfully urged that this conflict should be resolved, particularly since said private operating shipping companies have since been seeking permission from various District Courts for leave to file belated amended answers, withdrawing their prior admissions of ownership, operation and control of such vessels, and alleging that the

sole proper party to be sued now was the United States of America, under the provisions of the Suits in Admiralty Act (46 U. S. § 741, *et seq.*) and/or the Public Vessels Act (46 U. S. C. § 781, *et seq.*), which do not give a right to trial by jury, and which contain a two year statute of limitations, rather than the three year limitation period provided by the Jones Act.

5. As was pointed out by Circuit Judge J. Spencer Bell, in his dissenting opinion in the Court of Appeals below, the Government had previously persuaded the Court of Appeals for the Third Circuit in *The Petition of the United States*, 154 F. Supp. 714 (D. C. Del., 1957) aff'd 259 F. 2d 608 (C. A. 3rd, 1958), as well as the United States District Court for the Southern District of New York in *Chowaniec* v. *United States*, 149 F. Supp. 251 (S. D. N. Y., 1956), that the Government was only the owner of these vessels, while the private steamship firms operating the vessel (under the very same contract as is involved herein) were the employers of the members of the crew; that since the Government was not their employer, the private steamship firms were the proper parties to be sued.

6. The position previously taken by the Government was in conformity with many cases which recognize that the Government frequently engages private contractors to operate certain of its facilities and activities under contractual arrangements whereby the workmen are employees of the contractors only, despite the fact that the Government reserves to itself a certain amount of general supervision and control in order to protect its property, and to see to it that the purposes for which the work is being carried out with Government funds, are met *i.e.* that the general supervision of the Government does not alter the fact that the contractor remains liable for the details concerning the manner and the method of doing the work, the contractor doing the hiring and firing, paying social security taxes, etc.

See:

Powell v. *United States Cartridge Co.*, 339 U. S. 497 (1950), where employees of a private contractor, operating a Government-owned munitions plant under a cost plus fixed fee contract, were held not to be employees of the Government;

Maryland v. *United States*, 85 Sup. Ct. 1293 (1965) where a civilian National Guard pilot, trained and equipped under Federal standards, and permitted to use Federal equipment during training, during which the United States provided supplementary emoluments, was nevertheless not held to be an employee of the United States when his jet training plane, assigned to the National Guard, resulted in a collision with a private plane;

Anselmo v. *Ailes*, 235 F. Supp., 203 (E. D. N. Y., 1964) where employees at a missile base were held not to be Government employees despite the fact that the Government had inserted into the contract many detailed rights of supervision to insure that the work was properly performed and that its money was not wasted;

Stratton v. *United States*, 213 F. Supp. 556 (D. C. Tenn., 1962) where an employee, working at a Government-owned facility, was killed while making tests for the Air Force, and was held to be only an employee of the private corporation despite a measure of Governmental control;

Mahoney v. *United States*, 216 F. Supp. 523 (D. C. Tenn., 1962) where an employee at Oak Ridge became ill due to radioactive exposure, while working for a firm which had a contract with the Atomic Energy Commission, was held not to be a Government employee, even though the Government had limited control and paid the expenses of the work in the final analysis.

7. In *Cosmopolitan Shipping Co, Inc.* v. *McAllister,* 337 U. S. 783, 69 Sup. Ct. 1317 (1949), a majority of the Court pointed to certain express provisions in the General Agency Agreement under which War Shipping Administration vessels were operated during World War II. The G. A. A. contract there provided that "The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel."

On the other hand, the present MSTS standard form of contract applicable here contains explicit language that the members of the crew shall be employees of the private operating company, and not of the United States. It is clear from this agreement that these private companies, as Contractors, have retained control over the manner and method of performing the details of the work with the right to hire and fire, and the obligation to pay Social Security as employers; while the Government has only retained certain general supervisory duties.

Under the MSTS contract, it is therefore plain that, apart from perhaps designating various ports to which the vessel shall proceed (as may any time charterer), and permitting the use of MSTS local officers ashore for berthing instructions, etc. (as would a local agent acting for the charterer in a time charter part), it had deprived itself of the actual details of management and navigation of the vessel. In short, many of the functions which the Government has reserved to itself under the MSTS contract are similar to the general functions of a ship's husbanding agent, rather than the type of control exercised by a ship operator.

8. In light of *Cosmopolitan Shipping Co. Inc.* v. *McAllister, supra,* and many other cases decided at about that time, which involved litigation arising out of the World

War II effort on the so-called "General Agency" contract ships, it is inconceivable that the Government used careless language when it drafted the new subsequent contracts in time of peace for the operation of M. S. T. S. ships. It is inconceivable that the Government lawyers were unaware of the many cases which interpreted the effect of the old General Agency Agreement which is no longer in use. Where the old GAA agreement referred to the operating companies as "Agents", the new M. S. T. S. contracts refer to them as "Contractors"; where the old GAA contract explicitly made the master an employee of the United States, with full control over all aspects of the vessel's management, the present M. S. T. S. contract provides that the members of the crew shall be employees of the Contractor and not employees of the United States. Nowhere under the M. S. T. S. agreements are the steamship companies referred to, or limited to activity as "Agents", "Agencies" or "employees" of the United States, and consequently the proviso contained in 46 U. S. C. A. § 745 has no application here; and further a Jones Act suit by a seaman against his own private employer is not "the same subject matter" as a third party admiralty suit against the Government (which is not his employer), based on its liability as a shipowner. Compare *Reed* v. *SS Yaka*, 373 U. S. 410, 83 Sup. Ct. 1349 (1963) and *Grillea* v. *United States*, 232 F. 2d 919 (C. A. 2d, 1956).

9. Upon information and belief, many merchant seamen injured aboard such vessels will be in a state of uncertainty as to whether they will be deprived of their respective causes of action by reason of the expiration of the two year statute of limitations in the event that the decision of the Court below in the instant case, is permitted to stand; and the remainder will be uncertain whether they are to be deprived of their right to trial by jury. (Compare *Fitzgerald* v. *United States Lines*, 374 U. S. 16 (1963).)

There will also be uncertainty concerning questions of venue and jurisdiction which apply to suits against the Government.

The tendency of the Supreme Court has been to brush aside technical attempts to deprive injured maritime workers of substantial rights by reliance upon technical distinctions which are mere matters of form, rather than of substance.

Reed v. *S. S. Yaka, supra;*
Calbeck v. *Travelers Insurance Co.*, 370 U. S. 114, 82 Sup. Ct. 1196 (1962).

10. The American Trial Lawyers Association, and more particularly the members of its Admiralty Section, are concerned lest the impact of the matters referred to above be overlooked, and important issues in this case be decided without carefully considering the confusion created by the existing conflict which now exists in the light of *The Petition of the United States, supra* and *Chowaniec* v. *United States, supra,* when compared with the instant case in view of the vital distinctions between the General Agency Agreement provisions which were before the Supreme Court in *Cosmopolitan Shipping Co. Inc.* v. *McAllister,* 37 U. S. 783, 69 Sup. Ct. 1317 (1949), and the type of operating contract involved herein.

WHEREFORE, the American Trial Lawyers Association respectfully petitions this Honorable Court for leave to submit the within petition and brief as *amicus curiae* in support of the petition for a writ of certiorari, and prays that this Court will grant the writ, and resolve the conflict among the Circuits and settle this important issue of law which involves the rights of many other merchant seamen similarly situated; and in the event said petition is granted,

it respectfully petitions for leave to present oral argument by Louis R. Harolds, Esq., Chairman of the Admiralty Section of said Association.

Respectfully submitted,

AMERICAN TRIAL LAWYERS ASSOCIATION

By LOUIS R. HAROLDS, ESQ.,
Chairman of the Admiralty
Section
Of Counsel and on Brief.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 399

SARAH SMITH, AS ADMINISTRATRIX OF THE ESTATE OF JOHN C. SMITH, DECEASED, AND GEORGE THOMAS HOLLEY, PETITIONERS

v.

UNITED STATES OF AMERICA AND MARINE TRANSPORT LINES INC., AS OWNERS OF THE USNS POTOMAC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 30–39) is reported at 237 F. Supp. 434. The majority and dissenting opinions in the court of appeals are reported at 346 F. 2d 449 (Pet. App. 14–30).

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1965. The petition for a writ of certiorari was filed on July 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the operating agent of a public vessel owned by the United States is the "agent" of the United States for purposes of the exclusivity provision of the Suits in Admiralty Act, 46 U.S.C. 745.

STATUTE INVOLVED

46 U.S.C. 745:

> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim * * *.

STATEMENT

This case arises out of the destruction by fire of the USNS POTOMAC, a Navy tanker, while it was delivering a cargo of aviation gasoline and jet fuel for the Defense Department. At the time, the POTOMAC was being operated by the Navy through Marine Transport Lines, Inc., under a cost-plus-fixed-fee contract (Gov't App. 4a–6a).[1] Declared by the contract to be a "public vessel" dedicated to the "public use," the POTOMAC had been employed exclusively to haul petroleum products to military bases for national defense purposes (Gov't App. 2a).

[1] "Gov't App." refers to the Appendix to Brief for Appellees in the court of appeals. "App." refers to the Appendix to Brief for Appellants in the court of appeals. "Supp. App." refers to the Supplementary Appendix to Brief for Appellants in the court of appeals.

1. The standard form contract between the United States and Marine Transport defines a relationship in which Marine Transport is the agent of the United States for purposes of the operation of the USNS POTOMAC. Article 1 of the contract outlines this relationship. Marine Transport undertakes to "manage and conduct the business regarding the operation of such tankers as may be furnished to it by the Government from time to time" (Supp. App. 3). Article 1 goes on to require Marine Transport to authorize the master of the vessel to carry out orders and instructions of the Commander, Military Sea Transportation Service, "as regards employment of the vessel and prosecution of voyages" (Supp. App. 4). The Commander, MSTS, is required by the contract to issue "operating instructions" to Marine Transport (Supp. App. 4). The general operating instructions which have been issued specify that the Commander, MSTS, will issue "operational orders" which will include "loading instructions, amount and types of cargo, sailing orders, diversion orders, and discharge instructions" (Gov't App. 8a, 9a). The operating instructions further provide that the master will report in each port to the Government representative designated by the Commander, MSTS, for "local operational control" (Gov't App. 9a).

Under the remaining terms of the contract, the government agrees to reimburse Marine Transport for its costs, to pay a fixed fee for profit, and to assume the risks of the voyages. The vessels are declared to be owned by the United States as public vessels, employed solely in public use. While the

officers and crew are declared to be employees of Marine Transport, the government retains the right to require the termination of the employment of any individual (Pet. App. 35–39).

Vessels operating under the form of contract here involved are painted navy gray [2] and are required to have their name under the designation "U.S. Naval Ship" painted in white on the bow, port and starboard, on the stern, and on the port and starboard bridge name boards (Gov't App. 8a). These vessels are required to display flags in accordance with United States Navy regulations rather than the merchant marine practice (Gov't App. 10a–11a).

2. Following the disaster the United States and Marine Transport filed a joint petition for exoneration and limitation of liability in the Eastern District of North Carolina (where the wreck was located). The district court entered the customary order under Admiralty Rule 51, directing a monition to issue to all claimants and restraining institution and prosecution of all suits against the United States and Marine Transport in connection with the disaster, except in the limitation proceedings (Gov't App. 11a–13a).

Pursuant to the monition, some 38 claims totalling $2,100,000 were filed, including petitioners' claims. The limitation fund [3] is expected to be slightly in excess of $900,000. Following trial, petitioners moved

[2] MSTS Tanker Operating Instructions, Appendix J, Section A 4 (Aviation Fuel Terminals Ex. #8).

[3] The "limitation fund" paid into court by the shipowner represents the limit of his liability unless the limitation court finds that the shipowner is chargeable with knowledge of the act or condition that caused the accident. 46 U.S.C. 183.

to modify the restraining order to permit them to file separate suits outside the limitation proceedings against Marine Transport.

The district court, after a detailed review of the provisions of the contract between Marine Transport and the United States covering the operation of the USNS POTOMAC, denied both motions on the ground that Marine Transport was an "agent" of the United States within the meaning of the exclusivity provision of the Suits in Admiralty Act, 46 U.S.C. 745, as incorporated in the Public Vessels Act, 46 U.S.C. 782. The Suits in Admiralty Act provides that the remedy against the United States is exclusive of any action arising from the same subject matter against the "agent or employee" of the United States whose act or omission gave rise to the claim.[4] An interlocutory appeal was taken under 28 U.S.C. 1292(b). The court of appeals affirmed, one judge dissenting.

ARGUMENT

The question presented is whether seamen of a vessel owned by the United States and subject to its operational control through a standard contractual agreement with the vessel's operating agent have a remedy only against the United States under the Public Vessels Act for the act or omission of the agent, or whether in addition they have a remedy against the operating agent itself. Petitioners' substantive rights are not affected by this issue, for the United States is

[4] Petitioners were allowed to file protective suits against the United States pending appeal for purpose of tolling the statute of limitations (App. 80–84).

clearly subject to direct liability under that Act for anything that the agent did or failed to do in connection with the operation of the vessel. The chief practical consequence of the decision below is that seamen on such public vessels cannot obtain a jury trial under the Jones Act by suing the operating agent.[5] We submit that further review of this case is not warranted.

1. In the interlocutory posture of the present proceeding, it is entirely possible that petitioners would not be entitled to trial by jury regardless of the decisions below, and hence the question presented may well be academic. The district court noted that the 38 claims filed totalled $2,100,000, as against a limitation fund slightly in excess of $900,000 (Pet. App. 31-32). Thus, even if petitioners were permitted to sue Marine Transport, all claims would have to be tried in the limitation proceeding if Marine Transport's petition for limitation was granted. *Pershing Auto Rentals, Inc.* v. *Gaffney*, 279 F. 2d 546 (C.A. 5); compare *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147. Such a trial would be in admiralty, without a jury, despite the Jones Act. *In re East River Co.*, 266 U.S. 355. If Marine Transport was denied limitation, the question of its responsibility for the disaster would be settled by the judgment in the limitation proceeding, and the issues remaining for trial by jury in separate actions would be limited to causation and damages.

[5] There is, in addition, a two year statute of limitations under the Public Vessels Act, and a three year period under the Jones Act. There is, however, no question of the timeliness of petitioners' claims in this case.

2. Marine Transport was operating the POTOMAC for the benefit and at the expense of the United States and, as the contract and the operating instructions make clear, subject to the detailed control of the United States at all times. See *supra*, pp. 3–4. Within the usual meaning of the word, therefore, Marine Transport was the "agent" of the United States for the operation of the POTOMAC. Indeed, a clearer case of a principal-agent relationship is difficult to imagine.

Petitioners argue, however, that the term "agent" as used in the exclusivity provision of the Suits in Admiralty Act does not refer to an "operating agent" such as Marine Transport, but only to a "general agent" of the type involved in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 (*i.e.*, an agent "engaged to take care of the shoreside business of the ship and who has no part in the actual management or navigation of the vessel" (337 U.S. at 796)). Their argument is based on the view that the statute codified *Cosmopolitan* and its companion cases, which held that the remedy against the United States as owner of a vessel is exclusive in a "general agent" situation. However, the statute was also intended to codify *Johnson* v. *Emergency Fleet Corp.*, 280 U.S. 320, 322–323, 326–327, in which the remedy against the United States under the Suits in Admiralty Act was held exclusive in an "operating agent" situation.*

* See S. Rep. 2535, 81st Cong., 2d Sess., at 2–3, commenting on H.R. 483, which was enacted without pertinent change as 46 U.S.C. 745 in its present form:

"The first proviso declares the rule announced by the Supreme Court in *Cosmopolitan Shipping Co.* v. *McAllister* (337

Thus, Congress did not intend the term "agent" as used in the statute to mean only the "general agent" involved in the *Comopolitan* decision.[7] This is further shown by the fact that the bill as originally introduced specified "a general agent under a general agent service agreement." H.R. 4873, 80th Cong., 2d Sess.; see H. Rep. No. 2060, 80th Cong., 2d Sess., p. 5. But when the bill was finally passed, only the comprehensive term "agent" was used, without limiting language. The distinction between general agents and operating agents had been explicitly made in letters from the Department of Justice reprinted in all of the committee reports. H. Rep. 2060, 80th Cong., 2d Sess., p. 4; H. Rep. 1292, 81st Cong., 1st Sess., pp. 3-4; S. Rep. 1782, 81st Cong., 2d Sess., p. 4; S. Rep. 2535, 81st Cong., 2d Sess., p. 3. Thus the significance of the change from the specific term "gen-

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U.S. 783), *Caldarola* v. *Eckert* (332 U.S. 155), and *Johnson* v. *Emergency Fleet Corp.* (280 U.S. 320), that the remedy under the Suits in Admiralty Act is exclusive."

[7] Even if the exclusivity provision were read to have incorporated only the *Cosmopolitan* decision, petitioners' position would not be far advanced. For under that decision the requirement of suing the United States is not confined to the general agent situation. The broad test set forth in *Cosmopolitan* is "whose enterprise the operation of the vessel was." 337 U.S. at 795. As the district court found (Pet. App. 39), the USNS POTOMAC was clearly engaged on an enterprise of the United States Government. Carrying military cargo to a terminal designated by the Department of Defense, and subject to the detailed control of the United States in the planning and conduct of her voyages, the USNS POTOMAC was being operated as a public vessel of the United States entitled to the immunities and privileges of Government vessels (Gov't App. 7a). In no sense can this be said to have been an enterprise of Marine Transport rather than the United States.

eral agent" to the more general term "agent" could not have escaped Congress.

3. The decision below is not in conflict with any decision of another circuit.[a] *Petition of the United States*, 259 F. 2d 608 (C.A. 3), decided only that an operating agent of a public vessel was an "owner" entitled to petition for limitation of liability, the pertinent statute defining "owner" as "[t]he charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement" (46 U.S.C. 186). Contrary to the view of the dissenting opinion below, there is nothing inconsistent with an "agent" under the Suits in Admiralty Act meeting the requirements for filing a limitation petition. The determination of whether a party is entitled to petition for limitation is a preliminary matter not intended to be dispositive of the merits of defenses such as the defense here involved. Both *Atlantic Coast Line R. Co.* v. *Agwilines, Inc.*, 195 F. 2d 459 (C.A. 5), and *Hanlon* v. *Waterman Steamship Corp.*, 265 F. 2d 206 (C.A. 2), certiorari denied, 361 U.S. 822, were decisions holding that the exclusivity statute barred recovery against a general agent, and so did not involve the question whether the statute applies to operating agents.

4. The question presented is of limited importance.

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[a] The decision below is in conflict with the district court decision in *Petition of Oskar Tiedemann and Company, etc.*, 236 F. Supp. 895, 898–99, 900–901 (D. Del.), pending on appeal as C.A. 3, Nos. 15203, 15280, 15281, 15293, and 15294.

We are advised by the Department of the Navy that, as of June 30, 1965, there were only 30 vessels operated for the Navy under contract: 20 tankers with a civilian complement of 41 to 45 crew members and officers, and 10 other vessels with a civilian complement ranging from 40 to 89 crew members and officers. Although the particular form of contract involved in the instant case has been in use since 1948, the present case is the only appellate case of which we are aware involving the application of the exclusivity provision of the Suits in Admiralty Act to this form of contract, with the exception of the case now pending in the Third Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

October Term, 1965

No. 399

SARAH SMITH, as Administratrix of the Estate of JOHN C. SMITH, Deceased, and GEORGE THOMAS HOLLEY,

Petitioners,

v.

UNITED STATES OF AMERICA and MARINE TRANSPORT LINES INC., as Owners of the USNS POTOMAC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Argument

Contrary to the assertion on page 7 of the respondents' brief in opposition, the petitioners do not contend that Marine Transport Lines, Inc. was an "operating agent" or an agent of any other kind. In their brief the attorneys for the United States of America characterized Marine Transport Lines as an "operating agent" no less than eight times. This characterization, which is solely that of the attorneys for the United States, seems to have been in use by the Department of Justice since at least 1948, the year of the earliest of the Congressional Reports cited on page 8 of respondents' brief. Notwithstanding the age of the phrase, it does not in any way appear in the contract between

Marine Transport Lines, Inc. and the government, from which even the word "agent" is missing.

The question of agency was not presented to this Court in *Johnson* v. *Emergency Fleet Corp.*, 280 U. S. 320 (1930). Moreover, the language of 46 U. S. C. 745 which provides that the remedy against the United States is exclusive of any other action against the agent or employee of the United States, was in fact a limitation upon the rule announced in *Johnson* wherein the Court stated at 280 U. S. 327, "We conclude that the remedies given by the act are exclusive in all cases where a libel might be filed under it."

The brief for the respondents in opposition does not deny that the provisions of the contract between the United States of America and Marine Transport Lines were intended to promote, encourage and foster the American Merchant Marine in accordance with the Armed Services Procurement Regulations 32 C. F. R. §§ 1.1401(e) and 1.1402. Neither does the government contend that the General Military Law relating to procurement did not give the Secretary of Navy the authority to "make any kind of contract that he considers will promote the best interest of the United States". Title 10 U. S. C. § 2306. Consequently the government cannot imply that the provisions in the contract which recognize the right of the seamen to sue Marine Transport Lines are invalid.

The relationship of Marine Transport Lines to the national defense effort is not closer than that of the Civilian Caretakers of the National Guard for whose torts this Court ruled the United States was not responsible under the Federal Tort Claims Act. *Maryland, for the use of Levin* v. *United States,* 381 U. S. 41 (1965). Therein this Court ruled that the United States of America was not responsible for the actions of these Civilian Caretakers even though they were paid with federal funds, were required to

observe federal requirements in order to maintain their positions, and were employed to maintain federal property, 381 U. S. at 48. In *Levin,* the court relied in part upon the constant administrative practice of the Department of Defense to treat these civilian caretakers as state rather than federal employees. The administrative practice of the Department of the Navy and the United States of America in connection with the MSTS procurement contract prior to this litigation was to treat contractors such as Marine Transport Lines as other than "agents" under the Suits in Admiralty Act. The uniformity of the practice of the government and its contractors to allow civil suits to proceed against the contractor under the Jones Act is shown by the concluding statement in respondents' argument on page 10 of their brief wherein respondents recognize that this is the first appellate case involving the application of the exclusivity provision of the Suits in Admiralty Act. The practical interpretation of a contract by the parties themselves during performance is, of course, of great importance in resolving disputes involving contract interpretation. *Jansen* v. *United States,* 344 F. 2d 363 (Ct. Cl. 1965) and *Blanchard* v. *United States,* 347 F. 2d 268 (Ct. Cl. 1965).

Respondents concede as they must that seamen employed on board the vessels operated under contract are prejudiced by a two year as opposed to a three year statute of limitations. Moreover, the government has not even attempted to minimize the prejudice which will result to those seamen whose civil actions against Contractors have been pending for more than two years from the date of their injuries.

The number of vessels currently operated privately under the contract (30) is greater than the fleets of Grace Lines (27), Isthmian Lines (24), States Marine Lines (25), and Waterman Steamship Corp. (25); the number of vessels compares favorably with the size of the fleets of the

giants of American shipping, American Export-Isbrandtsen Lines (45), Lykes Brothers (49), Moore-McCormack Lines (50), and United States Lines (54).

The seamen who man these vessels are assigned by private employers in their customary manner (Smith-Holley Appendix Court of Appeals, 87, 91, 92). They received no warning of any type that they were to be treated differently on board the government owned vessels. The contract specifically provided "The officers and members of the crew shall be subject only to orders of the Master or Contractor. All personnel of the Contractor employed in the performance of work under this contract including the Master, other officers and crew members shall be employees of the Contractor at all times and not of the Government (Smith-Holley Supplementary Appendix Court of Appeals, 9).

More than fifty (50) pages of brief have been filed in this Court and the courts below by the attorneys for the United States; the government has not yet explained why, if the exclusive remedy of the seamen was to be against the United States of America under the Suits in Admiralty and Public Vessels Acts, the contract specifically provides that Marine Transport Lines was to be reimbursed for damages for death and personal injuries occurring to its seamen employees (Smith-Holley Supplementary Appendix Court of Appeals, 35, 37).

CONCLUSION

For the reasons set forth above and in the Petition heretofore filed, the Petition for Certiorari should be granted.

Respectfully submitted,

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